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Schabas, William A. ORCID logoORCID: <https://orcid.org/0000-0002-7462-4284> (2016)
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12

Aggression and International Human Rights Law

WILLIAM SCHABAS

12.1 Introduction

In January 1941, at the dawn of the modern international human rights law system and before the most terrible of armed conflicts had reached its paroxysm, US President Franklin D. Roosevelt set out his succinct vision of a ‘friendly, civilised society’. It was ‘no distant millennium’, but rather ‘a kind of world attainable in our own time and generation’, one that was the ‘very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb’. Roosevelt distilled his message into an inspired slogan: the celebrated ‘four freedoms’. The first two, speech and belief, are drawn from the classic civil rights of the Enlightenment and the revolutionary declarations of the eighteenth century. The third, ‘freedom from want’, reflects a notion of entitlement that was nourished by socialism and the welfare state. ‘The fourth is freedom from fear – which, translated into world terms,’ Roosevelt explained, ‘means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor— anywhere in the world.’¹

An intense period of legal codification followed the end of the Second World War. The resort to force to settle international disputes was outlawed by the United Nations Charter and subsequently condemned as an international crime – indeed, ‘the supreme international crime’ – by the International Military Tribunal. Under Eleanor Roosevelt’s leadership, the four freedoms were expanded and developed into thirty concise provisions: the Universal Declaration of Human Rights. Confirming the paternity of this ‘common standard of achievement’, the preamble of the Universal Declaration explicitly invokes the four freedoms, as do the preambles of the two international covenants adopted subsequently to complete the International Bill of Rights.

The importance of ‘freedom from fear’ manifested itself in the earliest drafts of the Universal Declaration of Human Rights. The initial text, prepared by the Secretariat under John Humphrey’s direction, proposed:

¹ *Congressional Record*, 1941, vol. 87, Pt. I.

The Preamble shall refer to the four freedoms and to the provisions of the Charter relating to human rights and shall enunciate the following principles:

1. that there can be no peace unless human rights and freedoms are respected;
2. that man does not have rights only; he owes duties to the society of which he forms part;
3. that man is a citizen both of his State and of the world;
4. that there can be no human dignity unless war and the threat of war is abolished.²

In the course of the drafting, these ideas were never contested, although the text itself underwent several permutations. The final version confirms the centrality of peace and the condemnation of war. There is a reference to peace in the first sentence of the preamble. The Universal Declaration of Human Rights also declares that it is 'essential to promote the development of friendly relations between nations'. Article 26(2) requires that education should 'further the activities of the United Nations for the maintenance of peace'. Finally, article 28 asserts that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. Asbjørn Eide wrote in his commentary on article 28 that 'it does not take much reflection to recognize that violence and war negatively affect the enjoyment of human rights. A social and political order in which all the rights in the Universal Declaration could be enjoyed would be possible only if there were peace on both the international and the national levels.'³

12.2 The Human Right to Peace

These references to the Universal Declaration of Human Rights demonstrate the centrality of peace within the codification of human rights principles. The Universal Declaration might be viewed as the third pillar of two contemporary normative developments: the prohibition on the use of force in the UN Charter and the criminalisation of aggression in the 1945 London Charter.

The Universal Declaration does not affirm a human right to peace in the sense that it devotes a provision to the explicit recognition of the concept. In many ways, the uncertain status of the right to peace within human rights law is similar to that of the crime of aggression; recognised at Nuremberg as the 'supreme

² ECOSOC, Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, 1st Session. Draft Outline of International Bill of Rights (prepared by the Division of Human Rights), 4 June 1947, UN Doc. E/CN.4/AC.1/3.

³ A. Eide, 'Article 28', in G. Alfredsson and A. Eide (eds.), *Universal Declaration of Human Rights* (Dordrecht: Kluwer Academic, 1999), 597–632, at 620.

crime', yet essentially absent in the modern-day international criminal tribunals, with the exception of the inchoate form that it has taken in the Rome Statute's initial version (a subject thoroughly addressed in other chapters of this book). Identification of a right to peace within the catalogue of human rights norms may take the Universal Declaration of Human Rights as a starting point. Such a right is premised on the implications of the preamble and some of the Declaration's provisions, and on the relationship of the Declaration with the UN Charter, to which it is bonded. Even if there is hesitation about recognising a full-blown 'human right to peace', the proposition that peace is a *sine qua non* for the full recognition, implementation and enforcement of human rights should be unarguable. Thus, measures to ensure and protect peace are inseparably linked with the promotion of human rights. The international criminalisation of the aggression stands as one such measure.

Several initiatives within expert bodies, regional organisations and UN agencies have affirmed a right to peace. The African Charter on Human and Peoples' Rights, adopted in 1981, recognises the peoples' right to peace ('All peoples shall have the right to national and international peace and security'). In 1996 and 1997, the now defunct Sub-Commission on the Promotion and Protection of Human Rights adopted resolutions that affirmed 'international peace and security as an essential condition for the enjoyment of human rights, above all the right to life'.⁴ During the 1980s and 1990s, UNESCO held a number of meetings on the subject of solidarity rights and, specifically, the right to peace. In 1995, the General Conference of UNESCO adopted the 'Declaration of Principles of Tolerance', which states that humans 'have the right to live in peace and to be as they are'.⁵ In 1998, Director General Federico Mayor convened a meeting of representatives and experts to aid in drafting a declaration on the right to peace. While some state representatives voiced doubts about the content of the right during the 1998 conference, they all supported the right to peace as a moral principle. However, the resulting draft was edited to leave out any explicit reference to the right to peace, and remained rather ambiguous. For example, the General Conference spelled out its goal, 'to build the defences of peace in the minds of human beings in everyday life', rather than recognising the right to peace.⁶

⁴ ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session. International Peace and Security as an essential Condition for the Enjoyment of Human Rights, above all the Right to Life, 25 November 1996, UN Doc. E/CN.4/Sub.2/RES/1996/16; ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Session. International Peace and Security as an essential Condition for the Enjoyment of Human Rights, above all the Right to Life, 28 August 1997, UN Doc. E/CN.4/Sub.2/RES/1997/36.

⁵ J. Symonides, 'New Human Rights Dimensions, Obstacles and Challenges: Introductory Remarks', in J. Symonides (ed.), *Human Rights: New Dimensions and Challenges* (Paris: UNESCO, 1998), 1–25, at 8.

⁶ Director General of UNESCO, Report on the Result of the International Consultation of Governmental Experts on the Human Right to Peace, delivered to Executive Board, 17 April 1998, UN Doc. 154 EX/40.

Central to the recognition of the norm is the 1984 United Nations General Assembly resolution titled 'The Peoples' Right to Peace'. The text proclaimed that 'the peoples of our planet have a sacred right to peace', and that 'the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each state'.⁷ Drawing upon the language of the General Assembly resolution, in 2002 the Commission on Human Rights affirmed 'the solemn proclamation that the peoples of our planet have a sacred right to peace'. The Commission stated 'that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each state'.⁸ The following year, the General Assembly adopted a resolution titled 'Promotion of the Right of Peoples to Peace'.⁹ In 2005, the Commission on Human Rights returned to the subject with a resolution on 'Promotion of Peace as a Vital Requirement for the Full Enjoyment of all Human Rights by All'.¹⁰ It was again echoed subsequently by a resolution in the General Assembly along the same lines.¹¹ All these resolutions referred to the 1984 Declaration.

The Human Rights Council replaced the Commission in 2006. Shortly after its foundation, a resolution on 'Promotion of the Right of Peoples to Peace' was adopted.¹² Like previous efforts, it failed to obtain consensus and a recorded vote was required. The European Union explained that it voted against the resolution, but noted the call for a seminar which could provide 'a more comprehensive and open debate' on the subject.¹³ No seminar was convened, however, with the ostensible reason being a lack of budget provisions for the event.¹⁴

The following year, another resolution was adopted along similar lines.¹⁵ Explaining the negative vote of the European Union members of the Council, the delegate from Germany said:

The European Union supports some of the principles set out in this draft resolution and recognizes the linkage between peace and enjoyment of human rights. However, the draft

⁷ General Assembly, Declaration on the Right of Peoples to Peace, 12 November 1984, UN Doc. A/RES/39/11, Annex, paras. 1–2.

⁸ ECOSOC, Commission on Human Rights, 58th Session. Promotion of the Right of Peoples to Peace, 25 April 2002, UN Doc. E/CN.4/RES/2002/71.

⁹ General Assembly, Promotion of the Right of Peoples to Peace, 27 February 2003, UN Doc. A/RES/57/216.

¹⁰ ECOSOC, Commission on Human Rights, 61st Session. Promotion of Peace as a vital Requirement for the full Enjoyment of all Human Rights by All, 20 April 2005, UN Doc. E/CN.4/RES/2005/56.

¹¹ General Assembly, Promotion of Peace as a Vital Requirement for the full Enjoyment of all Human Rights by All, 16 December 2005, UN Doc. A/RES/60/163.

¹² General Assembly, Human Rights Council, 8th Session. Promotion of the Right of Peoples to Peace, 18 June 2008, UN Doc. A/HRC/RES/8/9.

¹³ Explanation of vote by Slovenia (on behalf of EU) concerning UN Doc. A/HRC/8/L.13, 18 June 2008, available at: www.un.org/webcast/unhrc/archive.asp?go=080618.

¹⁴ General Assembly, Human Rights Council, 11th Session. Implementation of Human Rights Council Resolution 8/9 on the Promotion of the Right of Peoples to Peace, Note by the Secretariat, 17 March 2009, UN Doc. A/HRC/11/38.

¹⁵ General Assembly, Human Rights Council, 11th Session. Promotion of the Right of Peoples to Peace, 17 June 2009, UN Doc. A/HRC/RES/11/4.

resolution omits to state that the absence of peace cannot justify failure to respect human rights. Besides, it deals almost exclusively with the relationship between states and not with the relationship between the state and its citizens, and the state's respect for human rights, which is the core mandate of this council. We believe that most of the issues raised in this resolution are better dealt with in other fora which have the competence to do so and which are already dealing with these issues.¹⁶

The preamble of the 2009 resolution takes note of the 1984 Declaration of the General Assembly as well as the United Nations Millennium Declaration and the purposes and principles enshrined in the UN Charter. It also speaks of the obligation to refrain from the threat or use of force in international relations, and the importance of friendly relations and cooperation among states, with a reference to the 1970 Friendly Relations Declaration. The preamble of the 2009 resolution 'recogniz[es] that peace and security, development and human rights are mutually interlinked and reinforcing'. Echoing article 28 of the Universal Declaration of Human Rights, it also 'recall[s] that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized'.

In the operative paragraphs, the 2009 resolution stresses 'the importance of peace for the promotion and protection of all human rights for all'. The issue of the peoples' right to peace is linked to 'the deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed world and the developing world'. It insists that 'the policies of states be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use or threat of use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations'.

The expert seminar called for by the Council was held in December 2009. Antônio Cançado Trindade, the distinguished Brazilian human rights scholar and judge at the International Court of Justice, delivered the keynote address. Judge Cançado Trindade noted that 'the right of peoples to live in peace had been acknowledged and asserted before the [Inter-American Court of Human Rights] in a number of cases. He also referred to the case law of the European Court of Human Rights, as well as of the African Commission on Human and Peoples' Rights.'¹⁷

Acting upon the report of the expert meeting, in June 2010 the Human Rights Council requested its Advisory Committee to prepare a draft declaration on the

¹⁶ Explanation of vote by Germany (on behalf of EU) concerning UN Doc. A/HRC/RES/L.11, 17 June 2009, available at: www.un.org/webcast/unhrc/archive.asp?go=090617.

¹⁷ General Assembly, Human Rights Council, 14th Session. Report of the Office of the High Commissioner on the Outcome of the Expert Workshop on the Right of Peoples to Peace, 17 March 2010, UN Doc. A/HRC/14/38, para. 37.

right of peoples to peace.¹⁸ The resolution was adopted by thirty-one in favour with fourteen against – the Western European and Others group states and all the Eastern European states except Russia – with India abstaining.

The Advisory Committee provided the Council with a progress report,¹⁹ and its mandate was renewed the following year.²⁰ The Committee began speaking of the ‘human right to peace’.²¹ It subsequently proposed that the term ‘right to peace’ be used as it has both individual and collective dimensions.²² The Committee identified several dimensions to the right to peace, including international peace and security, disarmament, human security, resistance to oppression, peacekeeping, the right to conscientious objection and freedom of religion and belief and private military and security companies. Reviewing the ‘core dimension’ of international peace and security, it noted the adoption by the Review Conference of amendments to the Rome Statute dealing with the crime of aggression.²³ It proposed the following standard: ‘8. To strengthen international rule of law, all States should strive to support the International Criminal Court and its work on crimes against humanity, war crimes, the crime of genocide and the crime of aggression.’²⁴ Under the core dimension of human security, it proposed another standard: ‘All peoples and individuals have the right to be protected from ... wars of aggression ...’²⁵ With respect to conscientious objection, it suggested as a standard that ‘States have the obligation to prevent members of any military or other security institution from taking part in wars of aggression’.²⁶

The Advisory Committee submitted the draft declaration on the right to peace to the Human Rights Council in 2012. The preamble includes the following paragraph: ‘Convinced that the prohibition of the use of force is the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the human rights and fundamental freedoms proclaimed by the United Nations.’ Article 2(9) states: ‘To strengthen international rule of law, all States shall strive to support international justice applicable to all States equally and to prosecute the crime of genocide, crimes against humanity, war crimes and the crime of aggression.’ Article 5(2) declares:

¹⁸ General Assembly, Human Rights Council, 14th Session. Promotion of the Right of Peoples to Peace, 23 June 2010, UN Doc. A/HRC/RES/14/3, para. 15.

¹⁹ General Assembly, Human Rights Council, 17th Session. Progress Report of the Human Rights Council Advisory Committee on the Right of Peoples to Peace, 1 April 2011, UN Doc. A/HRC/17/39.

²⁰ General Assembly, Human Rights Council, 17th Session. Promotion of the Right of Peoples to Peace, 15 July 2011, UN Doc. A/HRC/RES/17/16. The vote was thirty-two in favour with the fourteen states associated with the Western European and Other group and the Eastern European states with the exception of Russia voting against.

²¹ General Assembly, Human Rights Council, 17th Session, *supra* note 19, at 6.

²² General Assembly, Human Rights Council, 20th Session. Report of the Human Rights Council Advisory Committee on the Right of Peoples to Peace, 16 April 2012, UN Doc. A/HRC/20/31, para. 7.

²³ General Assembly, Human Rights Council, 17th Session, *supra* note 19, at para. 23. ²⁴ *Ibid.*, at 6.

²⁵ *Ibid.*, at 9. ²⁶ *Ibid.*, at 12.

‘States have the obligation to prevent members of any military or other security institution from taking part in wars of aggression..²⁷

The Council responded to the Advisory Committee draft declaration, convening an ‘open-ended intergovernmental working group’ that was tasked ‘to progressively negotiate a draft United Nations declaration on the right to peace’.²⁸ The vote was recorded, with thirty-four in favour, one against, and twelve abstentions. It was divided almost entirely on regional lines. The United States voted against, the European members of the Council and India abstained.

The Open-Ended Intergovernmental Working Group met in February 2013. More than eighty member states and a large number of observers participated, although several of the leading international human rights non-governmental organisations were conspicuously absent.²⁹ The division in views shown by the earlier resolutions in the Council was reflected in assertions by some participants that there was no autonomous right to peace or that it could not be framed as an individual right.³⁰ If nothing else, the meeting confirmed the near impossibility of reaching anything resembling a consensus on such a declaration that could include the Western states. Nevertheless, work on the drafting of the declaration is proceeding subject to further instructions from the plenary Human Rights Council.

12.3 Indifference of Major Non-Governmental Organisations

Human rights organisations have been enthusiastic supporters of the international criminal justice project. From an initial position of diffidence with regard to criminal justice in general, reflected in a focus on the rights of accused and convicted persons, human rights discourse has evolved in recent decades as concerns with the rights of victims and the need to address impunity have taken an increasingly prominent place. Much of the language in the definitions of international crimes, especially crimes against humanity, is drawn from human rights instruments. Yet many of the major international human rights non-governmental organisations (NGOs) have shown indifference to the internationalisation of the crime of aggression. They have declined to campaign for ratification of the aggression amendments adopted in the 2010 Resolution on the Crime of Aggression at the Review Conference in Kampala. As a result, they have largely

²⁷ General Assembly, Human Rights Council, 20th Session, *supra* note 22

²⁸ General Assembly, Human Rights Council, 20th Session. Promotion of the Right to Peace, 17 July 2012, UN Doc. A/HRC/RES/20/15, para. 1.

²⁹ General Assembly, Human Rights Council, Open-ended Inter-Governmental Working Group on the Right to Peace, 1st Session. Report of the Open-ended Inter-Governmental Working Group on the Draft United Nations Declaration on the Right to Peace, 26 April 2013, UN Doc. A/HRC/WG.13/1/2, paras. 6–10.

³⁰ *Ibid.*, at paras. 20–26.

neutralised the role of the influential umbrella body, the Coalition for the International Criminal Court.

How have they explained their positions? Amnesty International has said it has not ‘taken a stance on the definition of the crime of aggression because its mandate – to campaign for every person to enjoy all of the human rights (civil and political and economic, social and cultural rights) enshrined in the Universal Declaration of Human Rights and other international human rights standards – does not extend to the lawfulness of the use of force’.³¹ This is Amnesty International’s interpretation of the Universal Declaration. The discussion earlier in this chapter, however, shows the strong arguments favouring an approach to the Declaration by which a human right to peace is at the very least a powerful *leitmotif*.

Human Rights Watch has taken a more pragmatic, policy-oriented view:

Human Rights Watch’s institutional mandate includes a position of strict neutrality on issues of *jus ad bellum*, because we find it the best way to focus on the conduct of war, or *jus in bello*, and thereby to promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law. Consistent with this approach, we take no position on the substance of a definition of the crime of aggression.

In a footnote to its explanation, Human Rights Watch added: ‘The only exceptions that Human Rights Watch has made to this policy is to call for military intervention where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s.’³²

The footnote in Human Rights Watch’s statement may provide a useful clue to understanding the reticence of the major NGOs in this area. A militaristic tendency has infiltrated the human rights movement in recent years, encouraged by talk of ‘humanitarian intervention’ and the ‘responsibility to protect’. Of course, human rights law has never been pacifistic, in the sense of a principled and intransigent opposition to the use of force under all circumstances. The preamble of the Universal Declaration of Human Rights says that human rights must be protected by the rule of law so that ‘man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression’. But there has been a growing willingness to contemplate military interventions as the ultimate solution to serious human rights violations.

Another influence may be the debates about the relationship between peace and justice in the context of prosecutorial strategy at the International Criminal Court (ICC). In situations where there is an arguable case that peace negotiations may be jeopardised by prosecution, such as northern Uganda and even Darfur, there has

³¹ Amnesty International, International Criminal Court, Concerns at the Seventh Session of the Assembly of States Parties, October 2008, Index: IOR 40/022/2008, 22.

³² Human Rights Watch, Memorandum for the Sixth Session of the Assembly of States Parties of the International Criminal Court, November 2007.

been political pressure on the Court to retreat from uncompromising prosecution out of respect for the interests of promoting peace. Encouraged by human rights NGOs, the previous Prosecutor Luis Moreno-Ocampo took the view that the quest for peace should not condition his decisions about selection of cases. In a policy paper issued in September 2007, he cited paragraph 3 of the preamble to the Rome Statute ('Recognizing that such grave crimes threaten the peace, security and well-being of the world'), noting that 'the ICC was created on the premise that justice is an essential component of a stable peace'. He wrote that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor'. Furthermore, 'the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions'.³³

Yet there is also much to be said for the view that the rationale of the ICC is to promote peace, just as it was for the ad hoc tribunals. The latter were, after all, created by the UN Security Council in pursuit of its mandate to promote international peace and security, with Chapter VII of the Charter invoked in support. According to the first annual report of the International Criminal Tribunal for the former Yugoslavia,

it would be wrong to assume that the Tribunal is based on the old maxim *fiat justitia et pereat mundus* (let justice be done, even if the world were to perish). The Tribunal is, rather, based on the maxim propounded by Hegel in 1821: *fiat justitia ne pereat mundus* (let justice be done lest the world should perish). Indeed, the judicial process aims at averting the exacerbation and aggravation of conflict and tension, thereby contributing, albeit gradually, to a lasting peace.³⁴

These words suggest that the pursuit of peace lies at the heart of the rationale for international justice. The idea dovetails neatly with the approach of the International Military Tribunal, which viewed a war of aggression as the supreme international crime; an overarching paradigm within which the other atrocity crimes – crimes against humanity and war crimes – found their place.

In suggesting that it should confine its activity to the *ius in bello*, Human Rights Watch transposed to the field of human rights law a concept that is well accepted in the law of armed conflict. For a century and a half, the International Committee for the Red Cross (ICRC) has insisted that its work of civilising the conduct of hostilities imposes a duty of neutrality. In order to intervene effectively on the battlefield, it cannot be seen to favour one side over the other. It is the very essence of the law of armed conflict that both sides be held to the same normative standards.

³³ Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007.

³⁴ General Assembly, 49th Session, Security Council, 49th Year. First Annual Report of the International Criminal Tribunal for the former Yugoslavia, 29 August 1994, UN Doc. A/49/342-S/1994/1007, Annex, para. 18.

But why should this logic apply to human rights law, which is concerned primarily with the protection of individuals from violations attributable to a state? This is not a matter of choosing sides so much as one of determining that the use of force by a state, which inexorably results in human suffering of huge proportions, violates the human rights of the victims to the extent that such use of force is unlawful. The problem with the contrary view – the one proposed by Human Rights Watch – is that it accepts rather too easily the loss of human life and the destruction of property resulting from the use of force by an aggressor, to the extent that this may be deemed ‘collateral damage’. The law of armed conflict tolerates ‘incidental’ loss of life and destruction of property as an inevitable accompaniment of war. When the war is itself unlawful, the law of human rights should not tolerate loss of life and the destruction of property based upon the trite proposal that it is unconcerned about *ius ad bellum*.

There is no good reason why human rights principles do not extend to the combatants themselves. There is some recognition of this in the protection of former combatants, those who are *hors de combat*, by international humanitarian law. But to the extent that the right to life of the non-combatant is entitled to protection, at the very least as a controlling factor in assessing the proportionality of ‘permissible’ collateral damage, a similar approach should also be taken to those combatants who are still active on the battlefield. The ICRC addressed this issue in principle IX of its Interpretive Guidance on the Notion of Direct Participation in Hostilities, adopted in 2009. This is sometimes described as the ‘kill or capture’ debate. The Committee said that although combatants were not required to take additional risks for themselves or the civilian population in order to take an armed adversary alive, ‘it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force’.³⁵ In effect, then, even in the most extreme circumstances of armed conflicts, the right to life of the combatant is entitled to some protection. The Committee expressly recognised the role of other bodies of law, and in particular international human rights law, in the regulation of the use of force in armed conflict.

12.4 *Ius Ad Bellum* and *Ius In Bello*

To explain its reticence on the incorporation of the crime of aggression in the Rome Statute of the ICC, Human Rights Watch invoked a Latin expression – *ius ad bellum, ius in bello* – that is more familiar to the field of international

³⁵ ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009’, *International Review of the Red Cross*, 90 (2008), 991–1047, at 1043–44.

humanitarian law than to that of international human rights law. The legality of the resort to force (*ius ad bellum*) is distinguished from the lawfulness of the conduct in the conflict (*ius in bello*). Neutrality with respect to the responsibility of one or the other parties for the outbreak of war is one of the hallmarks of the law of armed conflict, for good reason. It is probably overstating things, however, to suggest that even international humanitarian law, which is a more modern term for the law of armed conflict, is purely and exclusively focused on the *ius in bello*. The International Red Cross movement, which is in many respects the custodian of the law of armed conflict, has repeatedly underscored the importance of peace in the accomplishment of its work. Adopting principles to guide its work, in 1961 the International Federation of Red Cross and Red Crescent Societies said the movement,

born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.³⁶

The great Jean Pictet wrote that the founders of the Red Cross, and in particular Henry Dunant,

considered at the very beginning that the ultimate objective of the work they set in motion and the Convention they inspired was none other than that of universal peace. They understood the fact that the Red Cross, by pressing its ideal to its logical outcome, would be working for its own abolition, that a day would come when, men having finally accepted and put into effect its message of humanity by laying down and destroying their arms and thus making a future war impossible, the Red Cross would no longer have any reason for being.³⁷

In 1977, the Twenty-third International Conference of the Red Cross adopted a mission statement that included the following: ‘the Red Cross, in respecting its principles and in developing its manifold activities, should play an essential part in disseminating to the population, and especially to youth, the spirit of mutual understanding and friendship among all peoples, and thus promoting lasting peace’. It seems that as the Red Cross movement sought greater rapprochement with the growing area of human rights, the view that this was related to the quest for peace was of considerable importance in the search for a common perspective.

There has been some infiltration of *ius ad bellum* into the law of armed conflict itself. For example, article 1 of Protocol Additional I to the Geneva Conventions

³⁶ ICRC, *The Fundamental Principles of the Red Cross and Red Crescent* (Geneva: International Committee of the Red Cross, 1996) (emphasis added)

³⁷ J. Pictet, ‘The Fundamental Principles of the Red Cross: Commentary’, *International Review of the Red Cross*, 19 (1979), 130–49.

admits a special regime applicable to 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. The International Court of Justice (ICJ) has held that norms of humanitarian law relative to the prohibition of weapons that cause unnecessary suffering or superfluous harm, or are indiscriminate, do not apply strictly in the case of a country placed in an extreme situation of self-defence.³⁸ The statement is extremely troublesome to the extent that it even contemplates the possibility of lawful use of nuclear weapons. Even leaving the door slightly ajar to the use of any form of prohibited weapon as an exception to the general prohibition is fraught with terrible consequences. The conclusion of the Court is provided here only as an example of the inevitable blurring between the *ius ad bellum* and the *ius in bello*.

But even if, as a general principle, international humanitarian law is confined essentially to the *ius in bello*, why should the same be the case for human rights law? In its early years, the United Nations stood rather aloof from the law of armed conflict, out of concern that regulating war was somehow incompatible with the Charter.³⁹ The 1949 report of the International Law Commission states:

The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant . . . The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.⁴⁰

Views evolved, however, and in 1968 the International Conference on Human Rights, held in Tehran, affirmed that basic humanitarian principles must apply even in times of armed conflict. Since the Tehran Conference, there has been a concerted effort to reconcile humanitarian law and human rights law, as if they are parts of the same system and can be joined together seamlessly. The most significant attempt to relate the two bodies of law comes from the ICJ. With respect to the protection of the individual from arbitrary deprivation of the right to life set out in article 6(1) of the International Covenant on Civil and Political Rights, the ICJ has said that in armed conflict this human rights norm is to be assessed in the light of the *lex specialis*, which is the law of armed conflict:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain

³⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports* (1996), 226, para. 97.

³⁹ See, for example, ILC, 'Summary Record of the 6th Meeting', UN Doc. A/CN.4/SR.6 (1949), paras. 45–67.

⁴⁰ ILC, 'Report to the General Assembly on the Work of its First Session, 12 April–9 June 1949', UN Doc. A/CN.4/13 (1949), para. 18.

provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴¹

The ICJ developed its thinking on the subject of the relationship between international human rights law and international humanitarian law somewhat further in the Advisory Opinion on the separation wall in occupied Palestine:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁴²

According to Professor Hampson, the above citation makes it 'clear that *lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [the law of armed conflict/international humanitarian law].'⁴³ In the final analysis, however, the ICJ's formulation about the coexistence of humanitarian law and human rights law sounds a bit facile. The same observation about coexistence can be said of many bodies of law, both international and domestic, that may apply alongside the law of armed conflict during wartime.

The European Court of Human Rights (ECtHR) has considered the problem of 'incidental' loss of civilian life in cases dealing with the civil war in the Russian territory of Chechnya. It has steered clear of any attempt to address international humanitarian law or to articulate the principles governing the relationship it may have with human rights law. The ECtHR seems to have found an entirely adequate legal framework within human rights law, in contrast to the *lex specialis* approach

⁴¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 38, at para. 25.

⁴² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), *ICJ Reports* (2004), 136, para. 106. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* *ICJ Reports* (2005), 168, para. 216.

⁴³ ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 57th Session. Working Paper on the Relationship between Human Rights Law and International Humanitarian Law by Françoise Hampson and Ibrahim Salama, 21 June 2005, UN Doc. E/CN.4/Sub.2/2005/14, para. 57.

taken by the ICJ.⁴⁴ The methodology applied by the ECtHR in considering the permissibility of exceptions or limitations to human rights proceeds in stages.

The first issue addressed by the European Court is whether the limitation has a legitimate aim or purpose. In other words, it begins by considering the legality of the resort to lethal force rather than passing immediately to the legality of the way in which force is employed, something that follows from a *lex specialis* approach. Only if the state passes the legitimate aim or purpose threshold will the European Court consider the proportionality of the measure in question.

Admittedly, these cases all arise in situations of non-international armed conflict where the issue of aggression does not present itself, at least in the sense of inter-state aggression. As a jurisdictional matter, the European Convention probably does not apply to the conduct of hostilities in an international armed conflict. Although the United Kingdom has been found to be in breach of the European Convention for certain of its actions in Iraq, it has not yet been challenged with respect to loss of life of non-combatants with respect to the illegal 2003 invasion itself. Given the current state of the law, success in an application raising this issue would seem improbable. But the conclusion that the ECtHR may not have jurisdiction over such issues does not mean that fundamental human rights are not breached. The European Court case law dealing with non-international armed conflict very helpfully confirms the point that from a human rights law standpoint it is essential to consider the legality of the resort to force and not just the methods and means that are used.

If the law of armed conflict is the *lex specialis* of human rights law in wartime, at least as far as arbitrary deprivation of life is concerned, then the position of the ‘right to peace’ within human rights law becomes uncertain. But if there is indeed a right to peace located within the general framework of international human rights law, as the Human Rights Council resolutions suggest, then it is impossible to entirely reconcile this body of law with the law of armed conflict. To the extent that international human rights law views aggressive war as a violation of the right to peace, there is a point where efforts to fuse it to international humanitarian law can never entirely succeed.

12.5 Concluding Remarks

Article 20(1) of the International Covenant on Civil and Political Rights states that ‘any propaganda for war shall be prohibited by law’.⁴⁵ In its first General Comment

⁴⁴ For example, ECtHR, *Isayeva v. Russia*, Judgment, No. 57950/00, 24 February 2005; ECtHR, *Isayeva, Yusopova and Bazayeva v. Russia*, Judgment, Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005; ECtHR, *Akhmadov et al. v. Russia*, Judgment, No. 21586/02, 14 November 2008; ECtHR, *Albekov et al. v. Russia*, Judgment, No. 68216/01, 9 October 2008; ECtHR, *Arzu Akhmadova et al. v. Russia*, Judgment, No. 13670/03, 8 January 2009; ECtHR, *Umayeva v. Russia*, Judgment, No. 1200/03, 4 December 2008.

⁴⁵ M. Kearney, *The Prohibition of Propaganda for War in International Law* (Oxford University Press, 2007).

on the right to life, the Human Rights Committee invoked article 20(1) in support of a more general proposition about the right to life and armed conflict:

The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any state against another state, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.⁴⁶

The context of its adoption of the general comment seems to have been associated with the 1984 General Assembly Declaration. It also resonates in the academic literature of the time.⁴⁷ But this paragraph on the right to life is rarely invoked today, and possibly would not reappear were the Committee to revise its general comment.

The uncertain place of peace within human rights law also rears its head in some decisions of the ECtHR. In *Varnava et al.*, which concerned persons who had disappeared during the Turkish invasion of Cyprus, the Grand Chamber of the European Court of Human Rights wrote:

It may be that both sides in this conflict prefer not to attempt to bring out to the light of day the reprisals, extra-judicial killings and massacres that took place or to identify those amongst their own forces and citizens who were implicated. It may be that they prefer a 'politically-sensitive' approach to the missing persons problem and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the UN. That can have no bearing on the application of the provisions of the Convention.⁴⁸

The Court seemed to be saying that its job was to respond to individual petitions, and not to concern itself with broader collective interests where peace negotiations might be involved. In a dissenting opinion in a case involving discrimination in the Constitution of Bosnia and Herzegovina (which was itself part of the Dayton Peace

⁴⁶ Human Rights Committee, General Comment 6, Article 6, 16th Session (1982), UN Doc. HRI/GEN/1/Rev.6 (2003) 127, para. 2. See also General Comment 14, Article 6, 23rd Session (1984), UN Doc. HRI/GEN/1/Rev.6 (2003) 139, para. 2.

⁴⁷ For support for a 'right to peace', see V. P. Nanda, 'Nuclear Weapons and the Right to Peace Under International Law', *Brooklyn Journal of International Law*, 9 (1983), 283–96; A. B. Sajoo, 'Human Rights Perspectives on the Arms Race', *McGill Law Journal*, 28 (1982), 628–50; A. A. Tickhonov, 'The Inter-Relationship Between the Right to Life and the Right to Peace: Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life', in B. G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff, 1985), 97–113.

⁴⁸ ECtHR, *Varnava and Others v. Turkey*, Judgment, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 [GC], 18 September 2009, para. 193.

Agreement of 1995), Judge Bonello warned of the consequences of rigid application of human rights norms when the sensitive compromises of a peace agreement are concerned. He chided the majority for its failure to consider 'a clear and present danger of destabilizing the national equilibrium', adding: 'The Court has not found a hazard of civil war, the avoidance of carnage or the safeguard of territorial cohesion to have sufficient social value to justify some limitation on the rights of the two applicants ... I cannot endorse a Court that sows ideals and harvests massacre.'⁴⁹

There is, to be sure, no suggestion that human rights law is in some sense opposed to peace. Yet the growth in two fields that are closely related to human rights law, namely, international humanitarian law and international criminal law, may have helped to push the issue of peace to the periphery. The right to peace, whether presented as a peoples' right or an individual human right, has a legitimate position within the overall framework, even if its role today is best described as underdeveloped or latent. The evolving discussions on the right to peace within the Human Rights Council reflect both the appropriateness of its place on the agenda and hesitations about the importance that it should be given. Possibly those who are sceptical about the usefulness of a right to peace would adjust their views if they saw its potential to influence and frame the interpretation of other fundamental rights, not to mention the course of international criminal justice.

Above all, the notion of a right to peace provides a unifying principle that assists in bringing human rights law, international criminal law and international humanitarian law closer together. Unstated or understated in human rights law, it is nevertheless implicit. The right to peace very usefully puts other rights into perspective. Similarly, it rounds off the corners of international humanitarian law, so that a body of norms that sometimes looks like rules to govern killing and destruction takes on a more anti-war dimension. The overarching theme of a right to peace was important at the dawn of international prosecutions at Nuremberg and Tokyo, but later it seemed to lose its way. The adoption of amendments to the Rome Statute at the Review Conference in Kampala in June 2010 brings the crime of aggression back to centre stage. It is very regrettable that many within the human rights movement who have attached such importance to the International Criminal Court fail to appreciate the significance of the aggression amendments. Those who cherish the legal development resulting from the Review Conference may be comforted to know that the resistance faced in some quarters finds an echo in what amounts to a cognate debate underway within human rights law.

⁴⁹ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Dissenting Opinion of Judge Bonello, Nos. 27996/06 and 34836/06 [GC], 22 December 2009, 56.

This chapter began by citing Franklin Roosevelt's four freedoms speech. It so eloquently links fundamental rights and the prohibition of war. That clarity of vision may, to some extent, have become muddled over time. Possibly the horror of the war focused minds on the relationship between human rights and aggressive war. The first contentious case before the International Court of Justice dealt with issues resulting from the end of the Second World War and the dawn of the Cold War in a dispute between Albania and the United Kingdom that involved both *ius ad bellum* and *ius in bello*. The ICJ ruled against both parties: Albania had unlawfully placed mines in its territorial sea and the United Kingdom had unlawfully swept them. One of the judges in the case, the distinguished Chilean jurist Alejandro Álvarez, wrote:

The cataclysm through which we have just passed opens a *new era* in the history of civilization; it is of greater importance than all those that preceded it: more important than that of the Renaissance, than that of the French Revolution of 1789 or than that which followed the First World War; that is due to the profound changes which have taken place in every sphere of human activity, and above all in international affairs and in international law.⁵⁰

Two central and closely related features of this new era in international law are the protection of human rights and the condemnation of aggression. Nothing has changed.

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⁵⁰ *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)*, Individual Opinion of Judge Alvarez, *ICJ Reports* (1949), 4, 39.

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